

- (1) Claimant alleged he injured his low back on September 22, 1995, while working for the respondent when he picked up a 50 pound bag of dog food and later a 45 pound box

of pine logs. Claimant had returned to work on September 22, 1995, after he had been off of work for over one year for a prior work-related low back injury that occurred in April 1994. Claimant received medical treatment at the direction of the respondent on the day of the accident at Oak Park Health Services in Overland Park, Kansas. Claimant was diagnosed with an acute back sprain, given pain medication, and referred for further medical treatment to C. Eric Nye, M.D., an orthopedic surgeon in Shawnee Mission, Kansas. Dr. Nye had previously seen claimant for his work-related previous low back problem in 1994. Dr. Nye saw claimant on October 2, 1995, diagnosed recurrent traumatic lumbosacral strain with left sciatica. Claimant was taken off work by Dr. Nye, given a muscular relaxant, pain medication, and referred to physical therapy. At the time of the preliminary hearing, claimant remained under the care of Dr. Nye, having last seen him on May 3, 1996. However, respondent discontinued authorization of medical treatment after claimant's October 23, 1995, visit to Dr. Nye. Thereafter, medical treatment through Dr. Nye was paid through the state Medicaid welfare program. Respondent also terminated claimant's employment in October 1995.

During claimant's May 3, 1996, visit, Dr. Nye opined that because of claimant's low back injury he could not do the work that he was previously employed to do for the respondent. The doctor prescribed more pain medication and scheduled the claimant to return in three months for additional treatment and lumbar spine x-rays.

The Administrative Law Judge found claimant had suffered a work-related injury, ordered medical treatment with Dr. C. Eric Nye, M.D., and temporary total benefits to be paid from April 30, 1996, the date claimant filed his application for preliminary hearing, to continue until released to return to substantial gainful employment or until he reached maximum medical improvement. Respondent introduced a surveillance video tape taken of claimant on October 2, 1995, and October 4, 1995. The video tape showed the claimant walking with a noticeable limp on October 2, 1995, and walking without a limp on October 4, 1995. Respondent contended that the video tape placed claimant's credibility in question and, therefore, claimant had failed to sustain his burden of proving a compensable injury.

The Appeals Board has reviewed the surveillance video tape taken of claimant by the respondent. The Appeals Board agrees that the claimant on October 2, 1995, was walking with a limp and on October 4, 1995, one cannot detect a noticeable limp. The Appeals Board also recognizes that claimant testified that his low back injury did not cause him to limp all the time. Claimant testified his low back injury caused him to limp two to three hours at a time. The video tape taken on October 4, 1995, was two days after claimant had been treated with pain medication and showed claimant walking only a short distance without a noticeable limp. The Appeals Board finds that the preliminary hearing Order of the Administrative Law Judge finding that claimant had sustained a work-related injury should be affirmed. The Appeals Board finds that claimant's testimony and the medical records proved that claimant reinjured a previous low back problem while performing his regular work activities for the respondent on September 22, 1995. The Appeals Board also finds that it is reasonable that the claimant's low back condition could cause him to limp on some occasions and not others.

(2) The claimant requested the Appeals Board to modify the Administrative Law Judge's Order that entitled claimant to temporary total disability benefits to be paid by the

respondent from April 30, 1996, the date claimant filed his application for preliminary hearing. Claimant alleged that the proper date for payment of temporary total disability benefits would be to commence on the date of claimant's injury, September 22, 1995. The Appeals Board finds that the Administrative Law Judge is given specific authority to grant or deny temporary total disability benefits pursuant to the preliminary hearing statute found at K.S.A. 44-534a, as amended. Accordingly, the Appeals Board concludes, at this juncture of the proceeding, it does not have jurisdiction to review that issue in a preliminary hearing order.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Alvin E. Witwer dated June 27, 1996, should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

c: Daniel L. Smith, Overland Park, KS
H. Wayne Powers, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director